



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

1868, this court held "that the provision of the Constitution of the United States, which denies to a state the right to pass any law impairing the obligation of contracts, does not interfere with the right of a state to pass laws acting upon the remedy:" *Cutts & Johnson v. Hardee*, 38 Ga. 350; WARNER, J., dissenting. This decision was delivered upon the question as to the constitutionality of the Relief-Law, passed in 1868. In 1869, the Constitutionality of the Homestead and Exemption Laws was before the court, and the court held that "homestead and exemption laws, though retroactive, do not fall within the prohibition of article 10, sec. 1st of the Constitution of the United States, declaring that no state shall pass any law impairing the obliga-

tion of a contract;" and "that the Constitution of the United States does not prohibit a state from divesting a vested right, except when that right is vested by virtue of, and under a contract of the parties." WARNER, J., dissenting: *Hardeman v. Downer*, 39 Ga. 425. If this court could decide the Relief-Law of 1868 and the Homestead and Exemption Laws of 1869 constitutional, it will have no trouble in deciding the Statute of 1870 constitutional, and for the third time publicly disregard the adjudications of the Supreme Court of the United States which "rest upon a foundation of authority, too firm to be shaken."

J. H. T.

United States Circuit Court, Northern District of Georgia.

JEFFERSON C. FRENCH v. LEWIS TUMLIN.

Judgments of the courts of Georgia during the war are valid judgments so far as relates to parties within their jurisdiction.

A judgment of a court of Georgia, in November 1861, for the purchase-money of slaves, was a valid judgment when entered, and may be enforced now.

The provisions of the Constitution of Georgia that "no court shall have jurisdiction to enforce any debt the consideration of which was a slave or the hire thereof," so far as it relates to contracts valid when made, is repugnant to the Constitution of the United States, and void.

THIS was an action of debt on a bond conditioned for the payment of a judgment obtained by one Chisolm (whose assignee plaintiff was) in the Inferior Court of Cass (now Bartow) county, November 25th 1861, but stipulating that "if the State Convention, to be held in December 1867, or any state legislature, shall pass any resolution, ordinance, act, or law that shall relieve defendant from his constitutional and legal liability to pay said judgment, or any part thereof, then defendant is to be relieved and discharged from complying with said obligation in the same way and manner, and to the same extent, that he is relieved and discharged from the payment of the judgment," &c.

Defendant pleaded among other things that there was no consideration for the bond, because the judgment therein mentioned was utterly void, being rendered while the sovereign authority of the state was displaced and its constitutional government overthrown, and whilst its functions were usurped by a spurious and revolutionary government; and that said judgment was rendered by and under said spurious and revolutionary government, and was for the price and purchase-money of slaves, and for no other cause; that plaintiff took said bond with notice of these facts, and that he paid no value for the same, &c.

To this plea there was a replication and to the replication a special demurrer, but these are not necessary to notice in the view taken by the court.

Akin, Hammond & Son, and Dougherty, for plaintiff.

Bleckley, for defendant.

ERSKINE, D. J.—The obvious intention of the plea is to show that there was no consideration for the making of the bond; and, under the code, want of consideration is a good defence. The object and design of the other matters stated in the plea are, that the judgment is a nullity, because it was rendered in this state whilst the rightful government was overthrown, and its place usurped by a spurious authority; but if not void for that reason, then it was void because it was rendered upon an undertaking which cannot be recognised or enforced in this court, the price and purchase-money of slaves. The other branches of the plea may be passed over for the present. It is to the substantial elements alone of the plea that the court must look in giving judgment.

There is nothing indicated in the plea going to show that the defendants, or either of them, in the action brought by Chisolm in the Inferior Court of Cass (Bartow) county, had no notice of the action, or that they questioned the jurisdiction and had their plea overruled, and had no further remedy, or that for good reasons they did not appear and defend. And I find nothing in the record before me which states, or from which it can be inferred, that defendants in that suit were not citizens of Georgia, and one or both of them resident of Cass county, when the proceedings were instituted.

Had the Inferior Court, pending the action in 1861, jurisdiction of the parties and subject-matter of the suit brought by Chisolm against Fields and Tumlin, and if so, was the judgment for the purchase-money of slaves valid? and if valid, then can this court recognise it now, and if necessary enforce it?

Neither of these inquiries is free from embarrassment. I learn that these or similar questions now stand for argument on error or appeal before the Supreme Court of the United States. And had they not risen here, during the progress of a trial at bar, I would have deferred judgment and awaited the decision of the Supreme Court. But as they are directly presented by the pleadings, I will pass upon them—not with hesitancy in the performance of a duty, yet not without diffidence in my ability to perform it well. I shall be as brief as possible in my remarks.

Looking to the first specific clause in the plea, that the judgment rendered on the 26th of November 1861 was void, for the reason that it was pronounced during the rebellion, I refer to the case *Cuyler v. Ferrill*, 8 Am. Law Reg. N. S. 100. A suit had been instituted in 1862 or 1863, by certain heirs, through guardians, in the so-called Superior Court of Chatham county, in this state, to partition land. One of these heirs was a citizen of Alabama, the other of Georgia; but Dr. Cuyler, another heir, was a citizen of Pennsylvania, and, at the time the suit was pending, a surgeon in the national army. He was notified, in accordance with the statutory laws of Georgia, by publication, to appear and defend. He did neither. The court ordered the property, as it could not be equitably devised, to be sold, and Cuyler's share of the proceeds invested in Confederate bonds, which was done. The other heirs received their moiety in Confederate treasury notes. After the war, Cuyler filed his bill against Ferrill, who had purchased the property, and the other heirs, to set aside the proceedings. And I decreed them to be, so far as they concerned Dr. Cuyler, utterly null and void, because that tribunal had no jurisdiction of him or his estate. But as to the position of those heirs who had voluntarily sought the aid of that court, I declined to express any opinion. Had it been a point absolutely necessary for decision, I apprehend that I would have been warranted in holding that they or their guardians (as the case might be) were by their own voluntary act estopped from denying the validity of the proceedings in the so-called Superior Court.

In 1868 the Supreme Court of the United States, in *The State of Texas v. White*, 7 Wall. 100, said: "It is not necessary to attempt any exact definition within which the acts of said state (Texas) government must be treated as valid or invalid. It may be said, perhaps, with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts * * * providing remedies for injuries to person and estate, and other similar acts which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual though unlawful government."

I think that the court meant to employ the term "remedies" in the ordinary legal and judicial sense, and did not intend to confine it to the redress of torts and injuries alone, but that it should also apply to the enforcement of contracts. I do not think that the judgment is void for the first special cause alleged in the plea.

The next fact stated in the plea is, that the judgment was for the price and purchase-money of slaves and for no other cause whatsoever. Is the judgment invalid for this reason? The opinions which I have always entertained on the subject of slavery—the buying and selling of human beings like sheep in the shambles—must be here laid out of view; for it is the duty of the judge to declare the law of the case before the court, and to forget, while discharging his official duties, his own private opinions. Time will not permit me to give a full exposition of my views on this question. Therefore, in brief, if the contract was for the price and purchase-money of slaves, and that contract was the immediate subject of the action upon which the judgment of the 25th of November 1861 was founded, the judgment, when rendered, was, in the opinion of this court, valid. But it is said that even if valid then it is not so now, or if valid now it cannot be recognised, or (if necessary) enforced by this court; and the first paragraph of section 17, article 5, of the state constitution of 1868 is referred to. It is as follows:—

"No court or officer shall have, nor shall the General Assembly give, jurisdiction or authority to try or give judgment on or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof."

The word "judgment" is not in this paragraph, but it is necessarily included in the term "debt," a judgment being but a debt

of record—a chose in action—and in this state negotiable by endorsement or written assignment like bills or promissory notes ; but the transferee takes it “subject to the same equities and defences as the original plaintiff in judgment was.” This provision of the constitution has been before the Supreme Court of the state on more than one occasion. The leading case, however, is *Shorter v. Cobb et al.*, 39 Ga. 285. The opinion of the court (WARNER, J., dissenting) was delivered by Chief Justice BROWN. Shorter, as bearer, sued Cobb upon a promissory note made in 1861, and payable twelve months thereafter ; the note was given for slaves, and the court below dismissed the action for want of jurisdiction, and the Supreme Court of Georgia affirmed the judgment.

I here remark that it was in accordance with certain Acts of Congress that the state convention was called. A constitution was framed and submitted to Congress, and certain portions of it were stricken out by Congress. But the provision which I have just read was allowed to remain. On this matter the Chief Justice in his opinion says : “But it is the constitution as amended and approved by the Congress of the United States, by virtue of their authority as the conquering power, to dictate a form of government to the conquered, which is accepted by the people of the state as an act of obedience to the conqueror, and not as a matter of will or sanction.”

He afterwards says, “that Congress is presumed to have sanctioned every word and line of it which, upon examination, Congress did not, while amending it, require to be stricken out or changed.” From these propositions the Chief Justice draws the following corollary : “The state has not pretended to destroy the obligation of this class of contracts. She has simply said, with the sanction of Congress in forming her new government, that her (the state’s) courts shall have no jurisdiction to enforce them.”

In *Luther v. Borden*, 7 How. 42, the court said that “it rests with Congress to decide what government is the established one in a state. For, as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state, before it can determine whether it is republican or not.”

This question is wholly political, its determination belongs exclusively to Congress, and, therefore, it is in no wise judicial in

its nature. And it must not be forgotten that the executive, judicial, and legislative departments of the United States, though co-ordinate branches of the government of the nation, are, in their powers and functions, separate and distinct.

In rejecting certain provisions in the constitution of the state, or in allowing that relating to the inhibition placed upon the courts to take jurisdiction of debts, the consideration of which was a slave or the hire thereof, Congress did not, I apprehend, in any wise mean to interfere with the constitutional powers and functions of the judiciary department of the government, any more than the judiciary would assume to control the admission to Congress of senators or representatives. I cannot think otherwise than that Congress intended to leave the interpretation and construction of that provision in the state constitution exclusively and absolutely with the courts. This provision does not declare that contracts for the purchase of slaves shall be void, but that the courts shall not have jurisdiction or authority to enforce them. Does it, then, contravene any portion of the 10th section of the 1st Article of the Constitution of the United States, which declares that "no state shall pass any bill of attainder or *ex post facto* law, or law impairing the obligation of contracts?"

In the case of *Cohen v. Virginia*, 6 Wheat. 414, the court said, that "the constitution and laws of a state, so far as they are repugnant to the Constitution of the United States, are absolutely void." And in *Cummings v. The State of Missouri*, 4 Wall. 277, the court, Mr. Justice FIELD delivering the opinion, declared certain parts of the Constitution of the state of Missouri null and void, because they were in contravention of the 1st and 2d clause of this section.

I will now endeavor to ascertain and determine whether this provision in the state constitution impairs the obligation of contracts. For this purpose the case of *Von Hoffman v. City of Quincy*, 4 Wall. 535, may be relied upon, containing, as it does, a clear and exact exposition of this most important subject.

Mr. Justice SWAYNE, in delivering the opinion of the court, said: "It is also settled that the laws which subsist at the time and place of the making of the contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated in its terms. This prin-

ciple embraces alike those which affect its validity, construction, discharge, and enforcement.

"Without the remedy, the contract may indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the constitution against invasion.

"It is competent for the states to change the form of the remedy or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired."

Applying these citations to the provision in the state constitution now under consideration, it will become obvious that it is in direct conflict with the 10th section of the 1st article of the Constitution of the United States; indeed, it is not only an impairment of the obligation of the contract, but a denial of all remedies. And, in the language of Mr. Justice SWAYNE, "A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist:" *Von Hoffman v. City of Quincy*, 4 Wall. 554.

If contracts, entered into previously to the promulgation of the president's proclamation of emancipation, the consideration of which was the price and purchase-money of slaves, were then valid under the laws of the United States and of the state of Georgia, the aid of the courts must be given, if demanded, to enforce them. But if such contracts were invalid, the provision in the state constitution is mere surplusage.

There must be judgment *quod recuperet* on this plea.

I. The question in the foregoing case as to the right to enforce by suit a note given on the sale of slaves prior to emancipation, was thought to be involved in the case of *Generes v. Campbell* before the Supreme Court of the United States at its last session, and was argued there, but the report (11 Wall. 193) shows that the court took no notice of it, and decided the case upon other grounds.

The same question also arose in another case which was on the docket of the same court at the last term, and was

argued, but no opinion has yet been delivered. There is therefore no decision on the subject by the Supreme Court of the United States.

II. In *McNealy v. Gregory*, in the Supreme Court of Florida (April Term 1871), a question arose similar to that in the foregoing case, viz.: the validity of the 26th Sec., Art. 16, of the State Constitution, prohibiting the bringing of any suits after January 10th 1861, on notes, bills, &c., given for the purchase of slaves, and the clause was held to be

unconstitutional, as destroying the obligation of a contract.

The section is as follows: "It shall be the duty of the courts to consider that there is a failure of consideration, and it shall be so held by the courts of this state upon all deeds or bills of sale given for slaves with covenant or warranty of title or soundness, or both, upon all bills, bonds, notes, or other evidences of indebtedness given for or in consideration of slaves which are now outstanding and unpaid; and no action shall be maintained thereon; and all judgments and decrees rendered in any of the courts of this state since the 10th day of January 1861 upon all deeds or bills of sale, or upon any bond, bill, or note, or other evidence of debt, based upon the sale or purchase of slaves, are hereby declared set aside, and the plea of failure of consideration shall be held a good defence in all actions to said suit; and when money was due previous to the 10th day of January 1861, and slaves were given in consideration for such money, there shall be deemed a failure of consideration for the debt; *Provided*, That settlements and compromises of such transactions, made by the parties thereto, shall be respected."

On appeal from the Circuit Court of Calhoun County, dismissing a suit brought by Adam McNealy against Gregory on a promissory note given for the price of a slave purchased in March 1860—for want of jurisdiction to hear and determine the same, WESTCOTT, J., after a careful review of the entire subject, *held*:

1. The courts of this state derive their jurisdiction from the state constitution. They cannot assume jurisdiction not granted, or which is denied, although the effect may be that the obligation of a contract cannot be enforced. The jurisdiction of the courts is no part of the obligation of a contract.

2. The last clause of Sec. 26, Art.

16, of the Constitution, providing that "all judgments and decrees rendered in any of the courts of this state since January 10th 1861 upon all deeds or bills, &c., upon the purchase of slaves, are hereby declared set aside, &c.," is legislative, not judicial action: it prescribes a rule for the action of the courts in reference to a particular class of judgments upon their records; it is a law operating retrospectively upon the contract, and its effect is to make that which was a good consideration for a contract at the time and place it was entered into, not a good consideration; this is to destroy the obligation of the contract, and it is therefore void.

The abolition of slavery, or the emancipation of the slave, does not destroy the right of action which the vendor of the slave so emancipated has against the vendee, who owned the slave at the time of his emancipation, and any action of a convention of this character, which directs the courts to hold otherwise, is void, as it impairs the obligation of a contract.

3. If the purpose of the convention in this clause was to destroy all the right of the plaintiff in execution in this judgment, as a punishment for making this species of property the subject of sale, or for any other act, then viewed in this aspect, it becomes a bill of pains and penalties, and is void.

4. If it is regarded as the exercise of judicial power by the convention, the result of which is to set aside the judgment, then it is the exercise of a power by the delegate which had not been conferred, and the delegate possessed no inherent power of the character here exercised: nor could such an act become valid by receiving the sanction of a majority of votes of the people.

A citizen of the United States, in time of peace, has a right under the Constitution of the United States to have his rights to property made the subject of

adjudication and investigation by no other tribunal than one which is a part of a government which is republican in form, such as a Court of the United States, or of a state, where the judicial powers of government are confided to a recognised judicial department, controlled in its judgments by the law of the land; nor can the people, by a simple majority vote, give validity to the void act of a body of delegates which deprives the citizen of his property without due process of law.

III. In *Osborne v. Nicholson*, in the United States Circuit Court, for the Eastern District of Arkansas, the court, CALDWELL, J., reached a different conclusion upon the general question of the right to recover on such contracts. We regret that the opinion is too long for our pages, but give the abstract of the argument as stated by the court itself.

1. The institution of slavery under the Constitution of the United States, was purely local in its character, and confined to the several states where it existed, and was the creature of positive law, and this is true of all its incidents.

2. The Constitution of the United States did not regard slaves as property, but as persons; and it did not establish slavery or give any sanction to it, save in the single respect of the return of fugitives from service.

3. A remedy on a contract which is against sound morals, natural justice and right, may exist by virtue of the positive law under which the contract was made; but such remedy can only be enforced so long as that law remains in effect. As such remedy derives all its support from the statute, it cannot for any purpose survive its repeal.

4. The new Constitution of Arkansas declaring that "all contracts for the sale and purchase of slaves were null and void," is not in conflict with the clause of the Constitution of the United States prohibiting any state from pass-

ing any law impairing the obligation of contracts, which clause does not operate so as to perpetuate the institution of slavery or any of its incidents, these being matters over which the states had unlimited control.

5. The 13th amendment to the Constitution of the United States *ipso facto* destroyed the institution of slavery and all of its incidents, and put an end to all remedies growing out of sales of slaves.

7. In view of the 13th and 14th amendments to the Constitution of the United States, the court holds that a remedy on a contract for the sale of slaves is contrary to the spirit of their provisions, against public policy, and can not be maintained.

And again in *Buckner v. Street*, the same court, CALDWELL, J., reasserted its opinion to the same effect, holding:

1. Contracts for the purchase and sale of slaves are against sound morals, natural justice and right, and have no validity unless sanctioned by positive law.

2. A remedy on such contracts may exist by virtue of the positive law under which they were made, but such remedy can only be enforced so long as that law remains in force.

3. The 13th article of amendment to the Constitution of the United States repealed all laws sanctioning slavery, and the traffic in slaves and the right of action on slave contracts does not survive such repeal, founded as it is on the supreme authority of the people of the United States.

4. The rule that statutes should not receive an interpretation that will give them a retrospective operation, so as to divest vested rights of property, and perfect rights of action, has no application, so far as relates to slaves and slave contracts, in the construction of the 13th article of amendment of the Constitution of the United States.

J. T. M.